

STATE OF MICHIGAN
COURT OF APPEALS

KHADIJA GLASPIE,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED

December 20, 2011

No. 298877

Wayne Circuit Court

LC No. 09-028821-NO

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff Khadija Glaspie was injured when she tripped on a pothole on St. Lawrence Street in the city of Detroit. She submitted written notice to the City regarding her injury but failed to identify the exact location of the defect as required by MCL 691.1404(1). As plaintiff did not sufficiently clarify the location of the defect until well after the statutory notice period had expired, the trial court was bound to dismiss her claim. Accordingly, we reverse the trial court's order denying the City's motion for summary disposition.

I. BACKGROUND

On July 10, 2009, plaintiff left the Crazy Horse Saloon, located at 8140 Michigan Avenue, and walked to the side of the building, which faces St. Lawrence Street. Plaintiff turned onto St. Lawrence, where she had earlier parked her vehicle. In the St. Lawrence Street roadway, plaintiff tripped on a pothole and broke her ankle. Plaintiff sent the City written notice of her injury on July 28, 17 days after her accident. Plaintiff described the site as "a defective street located in front of Crazy Horse Saloon at 8140 Michigan Avenue in the City of Detroit, MI." Plaintiff further indicated, "I am enclosing color copied photographs depicting the defect."

Plaintiff filed a tort suit against the City 137 days after her accident, asserting that her claim fell within the highway exception to governmental immunity. Plaintiff alleged that she was injured "while walking on the public sidewalk, at or near 8140 Michigan Avenue, in the City of Detroit" when "she tripped over a defective sidewalk/pavement." Plaintiff did not specify that the pothole was on St. Lawrence Street until her February 23, 2010 deposition, 228 days after her accident.

The City sought summary disposition of plaintiff's claims under MCR 2.116(C)(7) and (10). The City's motion focused on the deficient description of the defect's location both in the

notice and the complaint. If the pothole were on Michigan Avenue, the City would bear no liability. Michigan Avenue is a state trunkline highway under the complete dominion of the state, not the City. See MCL 250.61. If the pothole were located “near” Michigan Avenue as alleged in the complaint or on St. Lawrence as alleged at the deposition, then plaintiff failed to adequately describe the defect’s location and the City was not given timely notice.

The trial court initially stayed the proceedings pending the Michigan Supreme Court’s decision in the factually similar case of *Mawri v Dearborn*. In *Mawri*, the circuit court declined to dismiss the plaintiff’s suit even though he provided the wrong address in his notice to the City and the attached photographs did not clarify the description of the defect’s location. This Court reversed and ordered the trial court to dismiss the plaintiff’s claim based on the insufficient description of the “exact location” of the defect. See *Mawri v Dearborn*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket No. 283893). The Supreme Court initially granted leave but ultimately vacated its order, thereby affirming this Court’s conclusion that summary disposition was appropriate. *Mawri v Dearborn*, 486 Mich 908 (2010). Thereafter, the trial court in this case proceeded to decide the City’s summary disposition motion. The trial court distinguished plaintiff’s notice to the City from the defective notice provided in *Mawri* and denied the City summary disposition.

II. STANDARD OF REVIEW

We review a trial court’s decision on a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466. Summary disposition is required under MCR 2.116(C)(7) when a claim barred by “immunity granted by law.” *Id.*

The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided. [*Id.* (internal quotations omitted).]

A motion under MCR 2.116(C)(10), on the other hand, tests the factual sufficiency of the complaint. Similar to a motion brought under (C)(7), the

trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

We also review issues of statutory interpretation de novo. *Kloostera v Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). We must apply the plain and unambiguous language of a statute as written to effectuate the Legislature’s intent. *Id.* at 296.

III. ANALYSIS

As a precondition for filing a tort action against a governmental agency, a plaintiff must provide notice to the agency with jurisdiction over the roadway. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009). MCL 691.1404(1) specifically provides:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify *the exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [Emphasis added.]

“The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.” *Plunkett*, 286 Mich App at 176-177. “[W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity’s attention.” *Id.* at 176. In fact, “a liberal construction of the notice requirements is favored.” *Id.* Therefore, substantial compliance with the notice requirements is sufficient so long as there is a “specific description of the location, time and nature of injuries.” *Id.* at 177-178.

At issue in this case is the adequacy of plaintiff’s description of “the exact location” of the pothole that caused her accident. It is clear that plaintiff did not describe “the exact location” of the defect in her notice supplied to the City 17 days after her accident. Plaintiff described the location of the defect as being “in front of Crazy Horse Saloon at 8140 Michigan Avenue in the City of Detroit, MI.” “In front of” the saloon is Michigan Avenue, not St. Lawrence Street. Plaintiff misidentified the defect’s location in her initial notice and therefore clearly did not provide a “specific description of the location.” *Id.* at 177-178. This rendered the notice defective. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007).

A plaintiff may, however, remedy any defects in her initial notice through a supplemental notice or pleading filed within the statutory notice period. *Burise v Pontiac*, 282 Mich App 646, 654-655; 766 NW2d 311 (2009). Plaintiff filed her complaint 137 days after her injury, outside the 120-day statutory notice period. Accordingly, plaintiff could not rectify the deficiency of her initial notice in this manner. In any event, plaintiff’s complaint did not provide an accurate “exact location” for the alleged roadway defect. In her complaint, plaintiff claims to have tripped on a sidewalk, not the roadway, and describes the pothole’s location as being “at or near 8140 Michigan Avenue.”

Plaintiff did not specify “the exact location” of the pothole until her deposition, which was 108 days after the expiration of the statutory notice period. The City had no notice that the pothole was actually located on St. Lawrence Street, rather than on Michigan Avenue or an adjacent sidewalk, until that time. Plaintiff neither strictly nor substantially complied with the requirements of MCL 691.1404(1). Absent the requisite notice, the City was immune from liability and plaintiff was precluded from seeking judicial relief. Accordingly, we reverse the

trial court's denial of the City's motion for summary disposition under MCR 2.116(C)(7). On remand, the trial court must dismiss plaintiff's suit.

We additionally reject plaintiff's argument that the three photographs provided to the City with her July 28 notice sufficiently supplemented her written description to specify the exact location of the defect.¹ One photograph depicts a pothole on a side street very near the intersection with a main highway. However, the photograph does not include a street sign or any other identifying feature. There simply is no way to determine the name of the street on which the pothole is located from the photograph. A second photograph depicts the sign on the front of the Crazy Horse Saloon. That photograph does nothing to delineate the name of the side street on which the pothole is located. There is no way to determine whether the intersection depicted in the first photograph is located to the east or west of the saloon or even on the opposite side of Michigan Avenue. The third photograph depicts a focused view of the pothole alone. While that photograph is useful to "specify the exact . . . nature of the defect," it does nothing to "specify the exact location." These photographs would not assist the City to determine the exact location of the defect. As such, the notice required by the statute was not provided.

Reversed and remanded for entry of summary disposition in the City's favor. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

¹ The City claims that plaintiff submitted only photograph with her notice of claim. However, plaintiff is the nonmoving party and we must accept as true her claim regarding the photographs. Even reviewing all three photographs, we conclude that summary disposition was required.